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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

PHANTOMALERT, INC., a Delaware
corporation,

Plaintiff,

v.

GOOGLE INC., a Delaware corporation,
WAZE, INC., a Delaware corporation, and
DOES 1–10, inclusive,

Defendants.

Case No. 3:15-cv-03986-JCS

**PLAINTIFF PHANTOMALERT,
INC.'S OPPOSITION TO
DEFENDANTS GOOGLE INC. AND
WAZE, INC.'S MOTION TO DISMISS**

Date: December 4, 2015

Time: 2:00 p.m.

Ctrm: G – 15th Floor

Judge: The Hon. Joseph C. Spero



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1 Plaintiff PhantomALERT, Inc. ("PhantomALERT") respectfully submits the
2 following memorandum of points and authorities in opposition to the Motion to Dismiss
3 filed by Defendants Google Inc. ("Google") and Waze, Inc. ("Waze"). [D.E. 19.]

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **INTRODUCTION**

6 PhantomALERT develops GPS-mapping applications. The applications sync with
7 PhantomALERT's database of various points of interest. Each point of interest
8 describes a different road hazard, speed camera, or other traffic condition. As
9 PhantomALERT users enter a geographic area, the applications alert the users to the
10 corresponding points of interest.

11 PhantomALERT uses a multi-step process to create each point of interest and to
12 organize those points of interest in its database. Among other things, PhantomALERT
13 revises the geographical data associated with each point of interest, evaluates the
14 importance of each point of interest, and removes points of interest that lack
15 corroboration or that have become stale. As a result, PhantomALERT's points of
16 interest do not reflect absolute facts, and the database does not reflect a complete set
17 of traffic conditions. Rather, the points of interest reflect PhantomALERT's best guess
18 as to what information will be most useful to users and what conditions are otherwise
19 noteworthy.

20 Without any authorization, Defendants copied PhantomALERT's points of
21 interest database and repurposed it for their competing applications. Based on
22 Defendants' conduct, PhantomALERT brought this suit and asserted claims for
23 copyright infringement and conversion. Defendants have moved to dismiss both claims.
24 However, Defendants have ignored the express allegations in the complaint while
25 repeating the predictable statement that the complaint "is almost entirely fact-free."
26 When one examines the straightforward allegations in the complaint, Defendants'
27 arguments fail, as summarized below.

- 28
- Contrary to Defendants' argument, PhantomALERT's database is copyrightable



1 because PhantomALERT's selection and arrangement of the points of interest
2 reflect far more than the minimal level of creativity required under *Feist Publ'ns,*
3 *Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 345 (1991). PhantomALERT
4 exercises discretion in editing, corroborating, arranging, and deleting the data in
5 the points of interest database, and this authorship satisfies *Feist's* minimal
6 creative spark standard.

- 7 • Second, the individual points of interest in the PhantomALERT database are also
8 copyrightable. The individual points of interest comprise data selected and edited
9 by PhantomALERT applying its discretion. Thus, these points of interest do not
10 reflect incontestable facts, but rather PhantomALERT's opinion as to what
11 information will be most useful to its users.
- 12 • Third, Defendants are incorrect that PhantomALERT must allege that Defendants
13 accessed the protected work to state a copyright claim. Rather, PhantomALERT
14 must allege that Defendants copied the protected work. PhantomALERT has
15 expressly alleged that both Defendants copied the points of interest database.
- 16 • Fourth, PhantomALERT's conversion claim is not preempted because it includes
17 elements not required for a copyright claim. Specifically, PhantomALERT has
18 alleged that Defendants copied the database without authorization and with an
19 intent to steal the database for their own commercial gain. Moreover, contrary to
20 Defendants' argument, a dispossession of property is not required to state a
21 conversion claim.
- 22 • Finally, PhantomALERT has stated claims against Google where: a)
23 PhantomALERT has specifically alleged that Google engaged in the misconduct,
24 and b) PhantomALERT has specifically alleged that Google and Waze merged,
25 and Google assumed Waze's liabilities.

26 The complaint sets forth a straightforward explanation of PhantomALERT's
27 claims, which are all legally viable. Thus, the Court should deny Defendants' motion to
28 dismiss.

BACKGROUND

PhantomALERT has created GPS-based navigation applications for mobile phones and GPS devices (the “PhantomALERT Apps” or the “Apps”). (Compl. ¶17.) The Apps notify users of the presence of traffic conditions, road hazards, and traffic enforcement monitors, such as speed cameras (collectively, the “Points of Interest”). (Compl. ¶17.) PhantomALERT maintains information about all of its Points of Interest in a database. (Compl. ¶18.) The PhantomALERT Apps access the database when a user enters into the corresponding geographic area. (Compl. ¶18.) The Apps then display the Points of Interest on a GPS-generated map. (Compl. ¶18.)

PhantomALERT uses a systematic process for creating the Points of Interest and arranging the Points of Interest in its database. (Compl. ¶19.)

- First, PhantomALERT allows users to submit potential Points of Interest to PhantomALERT through the Apps. (Compl. ¶20.)

- Second, PhantomALERT evaluates whether a user-submitted Point of Interest is a genuine Point of Interest based on a proprietary formula as well as human judgment. (Compl. ¶21.) Among other things, PhantomALERT determines whether multiple users of the Apps have reported the same Point of Interest, thereby corroborating its existence. (Compl. ¶21.) PhantomALERT also determines whether users of the Apps would consider the reported Point of Interest to be important. (Compl. ¶21.) As an example, PhantomALERT may decide to omit a “speed trap” Point of Interest from its database after determining that the speed trap does not pose a significant risk to users of the Apps. (Compl. ¶21.)

- Third, PhantomALERT edits the geographic and other data associated with the Point of Interest so that the Point of Interest is displayed in the most helpful location on users’ GPS-generated maps, with the optimal amount of advance warning to the users. (Compl. ¶22.) As an example, the location from which a person reports a speed camera is typically not the actual location of the camera. (Compl. ¶22.) Thus, PhantomALERT edits the geographic data associated with the speed camera and adds

1 data to alert users before they drive within range of the camera. (Compl. ¶22.)

2 • Fourth, PhantomALERT reviews the timing of the various users' reports
3 for a particular Point of Interest to ensure that the Point of Interest remains relevant.
4 (Compl. ¶23.) As an example, PhantomALERT may remove a "speed trap" Point of
5 Interest if no recent reports of the trap have been made. (Compl. ¶23.)

6 The PhantomALERT Apps do not seek to inform users of every road and traffic
7 condition that has ever been reported or that has ever existed. (Compl. ¶24.) Nor do
8 the Apps seek to inform users of the exact location of such conditions. (Compl. ¶22.)
9 Rather, the Apps seek to inform users of the Points of Interest that PhantomALERT
10 believes will be the most relevant to users and at the geographic locations that will be
11 most helpful to users. (Compl. ¶¶22–24.) Using the above-described process,
12 PhantomALERT creates, selects, and arranges the Points of Interest in a creative and
13 original manner. (Compl. ¶25.) On August 20, 2015, the United States Copyright Office
14 issued a copyright registration for the PhantomALERT App source code and the Points
15 of Interest database as a compilation, Registration No. TXu001954208. (Compl. ¶26.)

16 In June 2013, Defendant Google acquired all of the assets and liabilities of
17 Defendant Waze, and Waze was merged into Google. (Compl. ¶31.) Defendants
18 compete with PhantomALERT in operating a GPS-based application, which provides
19 route information and traffic details, including accidents, congestion, and speed and
20 police traps. (Compl. ¶28.) Like the PhantomALERT Apps, users of the Waze
21 application report accidents, traffic conditions, and speed traps through the application,
22 and thereby seek to streamline users' driving experience. (Compl. ¶29.)

23 On July 30, 2010, Noam Bardin, the CEO of Waze, contacted Yoseph Seyoum,
24 the CEO of PhantomALERT, and proposed cooperating in the operation of their
25 respective GPS-mapping companies. (Compl. ¶33.) More specifically, Bardin proposed
26 that Waze and PhantomALERT exchange their respective points of interest databases.
27 (Compl. ¶34.) Seyoum declined Bardin's offer because Waze did not appear to have
28 substantial data to share. (Compl. ¶34.)



After Seyoum rejected Bardin's offer, Waze copied the PhantomALERT Points of Interest database in its entirety without any authorization. (Compl. ¶¶35.) Waze also copied the PhantomALERT Points of Interest database on multiple, additional occasions after late 2012 as the database was updated. (Compl. ¶¶36.) Waze incorporated the copied data into the Waze application in a modified form and displayed that data to users through the Waze application. (Compl. ¶¶37–38.) Google continued to operate the Waze application after it acquired Waze in June 2013. (Compl. ¶¶32.) Moreover, Google incorporated aspects of the Waze application, including information from the PhantomALERT Points of Interest database, into Google's own mapping services. (Compl. ¶¶52.)

ARGUMENT

To survive a motion to dismiss, the complaint need only allege enough facts to state a claim for relief that is plausible on its face. See *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015). To meet this standard, the complaint must allege factual content that allows the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. See *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014). A court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the non-moving party. *Taylor*, 780 F.3d at 935.

A. PhantomALERT has pled a viable copyright infringement claim where it has alleged that Defendants copied and displayed a protectable work.

To state a claim for copyright infringement, a plaintiff must allege: (1) ownership of a valid copyright, and (2) that the defendant violated the copyright owner's exclusive rights under the Copyright Act. See *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004). PhantomALERT has alleged facts that satisfy both of these elements.

1. Analogous case law shows that the PhantomALERT database reflects more than enough creativity to be copyrightable.

To qualify for copyright protection, a work must be original to the author. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 345 (1991). "To be sure,



the requisite level of creativity is extremely low; even a slight amount will suffice.” *Id.* Factual compilations may possess this slight amount of creativity, as the compilation author typically chooses what facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. *See id.* at 348. “These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity,” are protectable under the Copyright Act. *Id.* “Thus, even a directory that contains absolutely no protectable written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.” *Id.* Significantly, “the originality requirement is not particularly stringent” and “novelty is not required.” *Id.* at 358. Originality requires only that the author make the selection or arrangement independently and that the work displays some minimal level of creativity. *Id.* Thus, “[t]he vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.” *Id.* at 345 (quoting 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990)).

Several post-*Feist* cases illustrate courts’ application of the *Feist* principles. These cases also show that PhantomALERT’s Points of Interest database is more creative than necessary to warrant copyright protection (*i.e.* it is more than minimally creative).

- *CDN Inc. v. Kapes*, 197 F.3d 1256 (9th Cir. 1999) – In this case, the Ninth Circuit addressed whether prices in a wholesale coin price guide contained sufficient originality to be copyrightable.¹ *See id.* at 1257–58. The prices reflected a synthesis of data selected by the publisher to estimate a coin’s value. *See id.* at 1257–58, 1260. The Ninth Circuit found that the spark of minimal originality “glows in CDN’s prices, which are compilations of data chosen and weighed with creativity and judgment.” *Id.* at 1260.

¹ *CDN* only addressed whether the individual coin prices themselves were copyrightable as a compilation and not whether the price list as a whole was copyrightable, as the plaintiff did not allege that the defendant had copied the entire price list but only individual entries.



1 • *Craigslist Inc. v. 3Taps Inc.*, 942 F. Supp. 2d 962 (N.D. Cal. 2013) — In
 2 *Craigslist*, this Court addressed the copyrightability of Craigslist’s structure for
 3 organizing classified ads. See *id.* at 966, 972. Craigslist organized its ads first by
 4 geographic area and then by category of product or service, and Craigslist claimed
 5 copyright protection in this compilation. See *id.* at 972. The Court denied the
 6 defendants’ motion to dismiss Craigslist’s copyright claim, finding that Craigslist had
 7 displayed the minimal level of creativity in deciding which categories to include and
 8 under what name. See *id.*

9 • *Honeywell Int’l, Inc. v. W. Support Grp., Inc.*, 947 F. Supp. 2d 1077 (D.
 10 Ariz. 2013) — In this case, the licensor of a copyrighted aircraft maintenance manual
 11 filed a copyright infringement claim against a distributor of the manual. See *id.* at 1078–
 12 79. FAA regulations controlled the “format” and “content” of such aircraft maintenance
 13 manuals. See *id.* at 1082. The defendant moved for summary judgment, arguing that
 14 the manual was not copyrightable because it was specifically dictated by the FAA
 15 regulations. See *id.* at 1079. The court rejected the argument, finding that while FAA
 16 regulations controlled the format and content of the manual, these requirements do “not
 17 foreclose the possibility that the author of an aircraft maintenance manual can exercise
 18 at least some creative control over the choosing, ordering, and/or arrangement of facts
 19 and procedures included in an aircraft maintenance manual.” *Id.* at 1083.

20 • *Salestraq Am., LLC v. Zyskowski*, 635 F. Supp. 2d 1178 (D. Nev. 2009) —
 21 In this case, the court addressed a compilation of factual information about residential
 22 properties in the Las Vegas area, including information about properties’ key attributes.
 23 See *id.* at 1179–80. The defendants moved to dismiss, arguing that the property listings
 24 were not copyrightable. See *id.* at 1181. The court denied the motion, finding that while
 25 the complaint:

26 does not go into detail about the level of creativity inhering in the
 27 Information Content, SalesTraq plausibly alleges the Information Content
 28 coordinates or arranges the underlying Base Property Content in such a
 way that the Information Content possesses a *de minimis* quantum of
 creativity. In particular, authoring content regarding key attributes of

properties implies a greater degree of creativity that the alphabetization rejected in *Feist*.

Id. at 1183.

- *City of New York v. Geodata Plus, LLC*, 537 F. Supp. 2d 443 (E.D.N.Y. 2007) — This case addressed the copyrightability of digital geographic map files containing coordinates and other data that permitted users to view vectorized images of tax blocks in New York (the “Bytes Files”). See *id.* at 445–46. The court rejected the defendant’s motion to dismiss, finding that the manual selection of the coordinates in the Bytes Files involved a distinctly human element in which independent decisions had to be made. See *id.* at 452. The court went on to state, “[t]aking into consideration the process by which the Bytes Files were created, as well as the other independent decisions involved in their creation—*i.e.*, which sources to use, which features to include or exclude—there is ample uncontested evidence of originality to surpass the minimum *Feist* standard.” *Id.*

Analogous cases from other jurisdictions reflect similar analyses. See, *e.g.*, *Eckes v. Card Prices Update*, 736 F.2d 859, 863 (2d Cir. 1984) (given selection, creativity, and judgment exercised in choosing among 18,000 baseball cards to identify 5,000 premium cards, price guide merited copyright protection); *BUC Int’l Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, 1145 (11th Cir. 2007) (affirming denial of copyright defendant’s motion for judgment as a matter of law where the selection and arrangement of data in a factual compilation of yacht prices was sufficiently creative to be copyrightable); *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 141–42 (5th Cir. 1992) (finding that plaintiff’s maps, which were based on government survey data and drawn on U.S. Geological Survey maps, passed muster under *Feist* because plaintiff’s selection and arrangement of data were sufficiently creative); *Cnty. of Suffolk, New York v. First Am. Real Estate Solutions*, 261 F.3d 179, 187–88 (2d Cir. 2001) (county’s tax maps, which contained original material and research had sufficient originality to be copyrightable even though content and form of maps were dictated by state law and regulations); *Metro. Reg’l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 888 F.





Supp. 2d 691, 710 (D. Md.) *aff'd*, 722 F.3d 591 (4th Cir. 2013) (where database owner “oversees and controls the quality and accuracy” of its database of more than 70,000 real estate listings uploaded by subscribers, database owner exhibited original selection and arrangement sufficient to satisfy *Feist*).

As with the above cases, PhantomALERT exercises creativity in selecting and arranging the Points of Interest in its database. Among other things, PhantomALERT evaluates whether a user-submitted Point of Interest is bona fide, requiring a certain number of user submissions of a particular Point of Interest in a given time period. (Compl. ¶21.) PhantomALERT also decides whether users would find a specific Point of Interest to be useful while driving, and removes those Points of Interest that PhantomALERT believes lack usefulness. (Compl. ¶21.) Furthermore, PhantomALERT edits the geographic data provided by users to maximize advance warning while still preserving immediacy. (Compl. ¶22.) Finally, PhantomALERT removes Points of Interest as user corroboration decreases. (Compl. ¶23.) As the complaint alleges, PhantomALERT does not seek to mechanically capture all road conditions. (Compl. ¶24.) Rather, PhantomALERT exercises its discretion in arranging and maintaining its Points of Interest database. (Compl. ¶24.)

In summary, PhantomALERT’s selection and arrangement of the Points of Interest in its database more than satisfy the “minimal level of creativity” needed for copyright protection.

2. The PhantomALERT database is not a process, but rather a specific expression of content in a tangible medium.

Defendants also argue that the PhantomALERT database is not copyrightable because the “processes described for arriving at the database are not expressive; rather these are ‘functional considerations at the heart of’ the claimed work.” (Mot. at 9:13–14.) Defendants misunderstand the difference between a process and a tangible expression of that process. Thus, Defendants’ sole authority for its argument—*i.e.* *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, No. 13-55763, 2015 WL

1 5845415 (9th Cir. Oct. 8, 2015)—is readily distinguishable.

2 The Copyright Act distinguishes between ideas and expression. Ideas,
3 processes, procedures, etc. are not copyrightable. See *Bikram's Yoga Coll. of India*,
4 2015 WL 5845415 at *3; 17 U.S.C. §102(b). By contrast, the expression of an idea,
5 process, or procedure in a tangible medium is copyrightable, so long as that expression
6 is minimally creative. See *Bikram's Yoga Coll. of India*, 2015 WL 5845415 at *3. Thus, a
7 copyright bars the use of the particular expression of an idea in a copyrighted work, but
8 does not bar use of the idea itself. See *Herbert Rosenthal Jewelry Corp. v. Kalpakian*,
9 446 F.2d 738, 741 (9th Cir. 1971). Upholding this dichotomy, in *Baker v. Selden*, 101
10 U.S. 99, 101–02 (1879), the Supreme Court held that a book's expression of a book-
11 keeping system was protectable, but the book-keeping system itself was not. More
12 recently, in *Bikram's Yoga Coll. of India*, the Ninth Circuit found that a book describing
13 yoga postures (*i.e.* asanas) was protectable, but the method of performing those asanas
14 was not. *Bikram's Yoga Coll. of India*, 2015 WL 5845415 at **passim*. In *L.A. Printex*
15 *Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841 (9th Cir. 2012), the Ninth Circuit
16 addressed the idea v. expression dichotomy in the context of a floral-patterned textile.
17 While the court found that the idea of a textile design containing open flowers and
18 closed buds in a single bouquet was not protectable, the plaintiff's original selection,
19 coordination, and arrangement of such elements in a specific textile was protectable.
20 See *id.* at 850–51. And in *McIntosh v. N. California Universal Enterprises Co.*, 670 F.
21 Supp. 2d 1069, 1096 (E.D. Cal. 2009), the court found that the idea behind a
22 subdivision map that created 68 residential lots could have been expressed in several
23 ways by the plaintiff, and therefore the plaintiff's particular expression of the subdivision
24 map was protectable.

25 Here, the parallels to *Baker*, *Bikram's Yoga*, *L.A. Printex*, and *McIntosh* are clear.
26 PhantomALERT does not allege that its process for selecting and arranging its Points of
27 Interest is copyrightable. Rather, PhantomALERT alleges that its specific expression of
28 that process, namely its resulting Points of Interest database, is copyrightable. Thus,





PhantomALERT has not alleged that Defendants infringed its copyright by using PhantomALERT's process to develop their own database. Rather, PhantomALERT has alleged that Defendants infringed its copyright by copying the entire Points of Interest database, an expressive work resulting from that process.

PhantomALERT's database is no different than the books at issue in *Baker* and *Bikram's Yoga*, the textile at issue in *L.A. Printex*, or the map at issue in *McIntosh*, all of which the courts found to be protected expressions of unprotectable processes. By copying PhantomALERT's database—as opposed to simply using PhantomALERT's process for generating points of interest—Defendants engaged in copyright infringement. Thus, Defendants' idea v. expression argument fails.

3. The individual Points of Interest are also copyrightable because they reflect PhantomAlert's creativity and judgment.

In addition to arguing that the PhantomALERT database is not copyrightable, Defendants argue that the individual Points of Interest are not copyrightable. Specifically, Defendants argue that PhantomALERT's Points of Interest are facts, and "one is perfectly free to use facts contained within a copyrighted database." (Mot. at 7:14.) Defendants' argument fails.

As discussed above, in *CDN Inc. v. Kapes*, 197 F.3d 1256, 1257–60 (9th Cir. 1999), the Ninth Circuit addressed a similar situation: *i.e.* whether coin values in a publisher's wholesale coin price guide were sufficiently original to sustain a copyright. The court found that "[t]he evidence indicates that the plaintiff uses its considerable expertise and judgment to determine how a multitude of variable factors impact upon available bid and ask price data. And it is this creative process which ultimately gives rise to the Plaintiff's 'best guess' as to what the current 'bid' and 'ask' prices should be." *Id.* at 1260.

PhantomALERT's Points of Interest are analogous to the protectable coin values in *CDN*. Specifically, a Point of Interest does not reflect an exact science or an undisputed fact. Rather, each Point of Interest reflects data that PhantomALERT has



1 selected and modified to provide users with PhantomALERT's "best guess" as to the
2 most valuable and useful road and traffic information. (Compl. ¶¶20–24.) As an
3 example, PhantomALERT exercises its expertise and judgment in deciding where to
4 place a speed camera on its GPS-generated maps so as to provide users with
5 maximum notice of the camera while still preserving the immediacy of the notification.
6 (Compl. ¶22.)

7 Defendants rely on *Assessment Technologies of WI, LLC v. WIREdata, Inc.*, 350
8 F.3d 640, 642 (7th Cir. 2003) to argue that PhantomALERT's individual Points of
9 Interest are not copyrightable. (Mot. at 7:6–13.) However, *Assessment Technologies* is
10 distinguishable. In *Assessment Technologies*, the plaintiff owned a copyright to software
11 used to compile real estate tax assessment data. See *id.* at 642. However, the actual
12 tax assessment data was not created or collected by the plaintiff, but by tax assessors
13 hired by municipalities. See *id.* No party contended that the underlying data provided by
14 the tax assessors was protectable; rather, the plaintiff claimed that the defendant had
15 infringed its copyright in the software program that contained the data. See *id.*

16 Here, by contrast, the Points of Interest comprise data that PhantomALERT
17 selected, arranged, and modified to maximize the utility of its Apps. Unlike *Assessment*
18 *Technologies*, where the data comprised undisputed facts provided by municipal tax
19 assessors, each of PhantomALERT's Points of Interest reflects a set of data created
20 and modified by PhantomALERT in its judgment and expertise. PhantomALERT's
21 creation and modification of this data imbued each Point of Interest with sufficient
22 creativity to satisfy the "extremely low" standard set forth in *Feist*.

23 In summary, because both the individual Points of Interest and the entire Points
24 of Interest database are original works of authorship, they are protected by the
25 Copyright Act.

26 **4. PhantomALERT has expressly alleged that Defendants copied the**
27 **PhantomALERT database.**

28 Defendants argue that to plead a claim for copyright infringement, the plaintiff



1 must establish access to the copyrighted work, and that PhantomALERT has not done
2 so here. (Mot. at 9:23–10:4.) Defendants are incorrect about both the law and the facts.

3 As discussed above, to state a claim for copyright infringement, a plaintiff must
4 allege (1) ownership of a valid copyright, and (2) copying of constituent elements of the
5 work that are original. *Feist Publ'ns, Inc.*, 499 U.S. at 361. The copying of the
6 constituent elements *may* be established by showing that the works in question are
7 substantially similar in their protected elements and that the infringing party had access
8 to the copyrighted work. See *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174 (9th Cir.
9 2003). Thus, contrary to Defendants' argument, proof of access is just one way to
10 establish unlawful copying, and the amount of access that needs to be proved depends
11 on the similarity of the infringing work.

12 Here, PhantomALERT has expressly alleged that Defendants copied the Points
13 of Interest database. Specifically, PhantomALERT has alleged that "Waze copied the
14 PhantomALERT Points of Interest database in its entirety in or around late 2012 without
15 any authorization or consent." (Compl. ¶35.) PhantomALERT has also alleged that
16 "Google continued to operate the Waze application, which copied, modified, and
17 displayed copyrighted information from the PhantomALERT Points of Interest database,
18 after it acquired Waze in June 2013." (Compl. ¶41.) And in order to copy a work, a party
19 must have accessed it.

20 In summary, Defendants have ignored the express allegations in the complaint in
21 arguing that Defendants did not copy (or have access to) PhantomALERT's Points of
22 Interest database.

23 **B. PhantomALERT has pled a viable conversion claim where it has alleged**
24 **that Defendants took its Points of Interest database without its consent.**

25 To state a conversion claim under California law, a plaintiff must allege: (1) the
26 plaintiff's ownership or right to possession of the property; (2) the defendant's
27 conversion by a wrongful act or disposition of property rights; and (3) damages. See
28 *Lee v. Hanley*, 61 Cal. 4th 1225, 1240 (2015). Intangible property may be the subject of

a conversion action. See *J & J Sports Prods., Inc. v. Flores*, 913 F. Supp. 2d 950, 963 (E.D. Cal. 2012). Here, PhantomALERT has adequately pled a conversion claim where PhantomALERT has alleged that it owns the Points of Interest database and that Defendants copied the database for their own use.

1. PhantomALERT's conversion claim is not preempted where PhantomALERT has alleged elements in addition to copying.

Defendants argue that the Copyright Act preempts PhantomALERT's conversion claim. (Mot. at 10:15–11:15.) More specifically, Defendants argue that “[w]hen the claim for conversion is nothing more than unauthorized reproduction of an intangible work, as opposed to actually taking another's physical property for oneself, the Copyright Act preempts the claim.” (Mot. at 10:27–11:1.) This is incorrect. Rather, the Copyright Act preempts a state law claim when two elements are present. First, the rights asserted by the plaintiff under state law must be equivalent to the rights protected by the Copyright Act. Second, the work involved must fall within the “subject matter” of the Copyright Act. See *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212 (9th Cir. 1998). When a state law claim includes an additional element, not required for a copyright infringement claim, the two claims are not equivalent, and the first prong of the preemption test fails. See *G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 904 (9th Cir. 1992).

As an example, in *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 973 (N.D. Cal. 2015), the defendants created applications that copied and disseminated address book information stored in Apple devices. Plaintiffs, who were users affected by these applications, asserted a conversion claim against the application developers. See *id.* The defendants moved to dismiss the claim, arguing that it was preempted by the Copyright Act. See *id.* at 988. This Court denied the motion, finding that the conversion claim was not equivalent to a copyright claim where the conversion claim included acts beyond reproduction. See *id.* at 989. More specifically, the plaintiffs had alleged that the defendants engaged in unauthorized access, misuse, and misappropriation of the data,



1 none of which was required for a copyright claim. See *id.*

2 Similarly, in *G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Serv., Inc.*, 958
3 F.2d 896, 899 (9th Cir. 1992), the plaintiff had obtained an FAA certificate approving an
4 aircraft modification. The plaintiff brought a conversion claim against an aircraft owner
5 who had used a copy of plaintiff's FAA certificate to apply for approval of its own
6 airplane modification. See *id.* at 899–900. The court found that the Copyright Act did not
7 preempt plaintiff's conversion claim because while the defendant was free to make as
8 many copies of the FAA certificate as it wished (and any claim to the contrary would be
9 preempted), the Copyright Act did not preempt claims that arose from the defendant's
10 misuse of the certificate to obtain an airworthiness approval. See *id.* at 904; see also
11 *Salestraq Am., LLC*, 635 F. Supp. 2d at 1185 (state law claims based on allegations
12 that defendants copied residential property database and used it for their own
13 commercial benefit were not preempted by Copyright Act where state claims were
14 qualitatively different from copyright claim); *Merch. Transaction Sys., Inc. v. Nelcela,*
15 *Inc.*, No. CV 02-1954PHXMHM, 2009 WL 2355807, at *2 (D. Ariz. July 28, 2009) (claim
16 for conversion of computer software was not preempted by Copyright Act where claim
17 included additional element of wrongful taking, *i.e.*, theft of the computer software).

18 The instant action is analogous to the above-cited cases. PhantomALERT has
19 alleged that Defendants first tried to broker an exchange of the Points of Interest
20 database from PhantomALERT. (Compl. ¶34.) When that proposal failed, Defendants,
21 without any authorization, copied the entire Points of Interest database. (Compl. ¶35.)
22 Defendants then integrated PhantomALERT's database into their own applications for
23 their own commercial benefit. (Compl. ¶¶37, 52.) Thus, PhantomALERT's allegations of
24 Defendants' unauthorized access, intent to steal, and subsequent commercial misuse
25 remove PhantomALERT's conversion claim from the scope of copyright preemption.

26 **2. Conversion does not require a dispossession of the property at**
27 **issue.**

28 Defendants also argue that PhantomALERT's conversion claim is deficient



1 because Defendants did not deprive PhantomALERT of the full possession of its Points
2 of Interest database. Specifically, Defendants argue that the “mere copying of
3 information where the plaintiff still has full possession of that information is not
4 conversion.” (Mot. at 11:25–26.) This statement is incorrect, and it is not supported by
5 Defendants’ authority.

6 Under California law, intangible property may be the subject of conversion. See *J*
7 *& J Sports Prods., Inc.*, 913 F. Supp. 2d at 953. Regardless of the nature of the
8 property, a party claiming conversion must allege that the converter assumed control
9 over the property *or* that the converter applied the property to its own use. See *Mohebbi*
10 *v. Khazen*, 50 F. Supp. 3d 1234, 1257 (N.D. Cal. 2014). Thus, a plaintiff does not need
11 to allege dispossession to state a conversion claim, as Defendants argue; rather, a
12 plaintiff may allege that the defendant applied the converted property to its own use.

13 As an example, in *Celebrity Chefs Tour, LLC v. Macy’s, Inc.*, 16 F. Supp. 3d
14 1141, 1151 (S.D. Cal. 2014) (incorporating background facts from *Celebrity Chefs Tour,*
15 *LLC v. Macy’s, Inc.*, 16 F. Supp. 3d 1123 (S.D. Cal. 2014)), a television show’s producer
16 claimed that a sponsor converted taped material of a celebrity cooking show and
17 released that footage to public broadcast stations under the sponsor’s name. The court
18 found that the plaintiff stated a claim against the sponsor for conversion of the “Tour
19 footage” where the plaintiff alleged that it owned a copyright in the footage and that
20 Macy’s had used the footage for its own benefit. See *id.* at 1151–52. The court further
21 held, “[t]hat Macy’s may not have ever possessed the physical [tapes] is of no
22 consequence, as it gained possession and claimed ownership of the intellectual
23 property contained therein.” *Id.* at 1152; see also *Farmers Ins. Exch. v. Zerin*, 53 Cal.
24 App. 4th 445, 451–52 (1997) (“It is not necessary that there be a manual taking of the
25 property; it is only necessary to show an assumption of control or ownership over the
26 property, or that the alleged converter has applied the property to his own use.”).

27 Here, PhantomALERT has alleged that Defendants exploited the Points of
28 Interest database for their own use after copying it without authorization. (Compl. ¶¶37–



38, 40–41, 52.) Thus, PhantomALERT has stated a claim for conversion under California law even if it did not lose full control of its Points of Interest database.

Defendants' authority is inapposite. First, contrary to Defendants' argument, *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003) does not contain a three-part test for conversion. Rather, *Kremen* sets forth this three-part test "to determine whether a property right exists." *Id.* at 1030. *Kremen* goes on to state that "[p]roperty is a broad concept that includes 'every intangible benefit and prerogative susceptible of possession or disposition.'" *Id.* (quoting *Downing v. Mun. Court*, 88 Cal. App. 2d 345, 350 (1948)). In fact, under California law, property is the right of any person to possess, use, enjoy, and dispose of a thing. *Union Pac. R.R. Co. v. Santa Fe Pac. Pipelines, Inc.*, 231 Cal. App. 4th 134, 157 (2014). Here, PhantomALERT has alleged that it has the right to possess and use its Points of Interest database, and thus it has alleged a property interest in the database.

Defendants' reliance on *Opperman v. Path, Inc.*, 87 F. Supp. 3d 1018, 1056 (N.D. Cal. 2014) is also misplaced. The portion of the decision cited by Defendants addresses Article III standing, not dispossession of property, and it states:

The Court does not read these decisions to be holding that consumers do not have property rights in their electronically stored private information, but that the copying of such information without any meaningful economic injury to consumers is insufficient to establish standing on that basis.

Because PhantomALERT has alleged that it was injured as a result of Defendants' copying of the Points of Interest database (Compl. ¶53), PhantomALERT has stated a claim for conversion. See Civ. Code §3336 (defining detriment resulting from conversion to include value of property at the time of conversion, along with interest, and fair compensation for the time and money expended in pursuit of the property).

C. Defendants disregard the express allegations of the complaint in arguing that Google is not liable to PhantomALERT.

Defendants argue that the complaint does not allege a viable claim against Google because Google did not acquire Waze's liabilities. (Mot. at 12:10–13:18.)

Specifically, Defendants argue: a) Google purchased the shares of Waze's parent corporation (and not the assets and liabilities of Waze), and Waze continues to operate as an independent Delaware corporation; and b) even if Google had purchased Waze's assets, it did not purchase Waze's liabilities. (*Id.*) Defendants' arguments contradict the express allegations of the complaint.

First, regardless of the structure of Google's acquisition of Waze, the complaint specifically alleges that Google itself engaged in the misconduct. Specifically, the complaint alleges:

Google incorporated aspects of the Waze application, including information from the PhantomALERT Points of Interest database, into Google's own mapping services. Thereafter, on information and belief, Google reproduced the information from the Points of Interest database, created derivative works from the information, displayed the information, and sold or leased the information to users through an end user license agreement.

(Compl. ¶52.) As discussed above, both the Points of Interest database and the individual Points of Interest comprise property owned by PhantomALERT, and they are copyrighted works. Thus, PhantomALERT has stated copyright and conversion claims against Google.

Second, PhantomALERT has alleged that "in June 2013, Google acquired all of the assets and liabilities of Waze, and Waze was merged into Google." (Compl. ¶31.) Defendants argue that this allegation is "simply false," and they submit a Delaware certificate of good standing to show that Waze continues to operate as an independent Delaware corporation. (Mot. at 12:13–24.) However, this certificate merely shows that a corporation named Waze Inc. still exists on the files of the Delaware Secretary of State. The certificate does not establish whether that corporation has any assets or liabilities, whether its former assets or liabilities were sold to Google, or even whether the company merged with Google and failed to file the appropriate "merge out" documents.²

² While beyond the scope of Defendants' motion, PhantomALERT notes that few public records exist describing the structure of Google's acquisition of Waze, but that Google has not identified Waze or Waze Ltd. as a subsidiary in its post-acquisition SEC filings.





Finally, Defendants argue that PhantomALERT cannot overcome the general rule of successor liability that when a corporation purchases the assets of another corporation, the purchasing corporation does not assume the liabilities of the selling corporation. (Mot. at 12:25–28.) However, this rule does not apply to mergers, and the complaint alleges that Waze was merged into Google. See *Maudlin v. Pac. Decision Sciences Corp.*, 137 Cal. App. 4th 1001, 1016 (2006) (surviving company in merger is subject to all of the debts and liabilities of the disappearing corporation in the same manner as if the surviving corporation had itself incurred them). Moreover, even with an asset purchase, the purchaser takes on the liabilities of the seller when the transaction amounts to a consolidation or merger of the two corporations. See *Franklin v. USX Corp.*, 87 Cal. App. 4th 615, 621 (2001). Here, the complaint specifically alleges that Waze was merged into Google, thereby triggering this exception to the general rule of successor liability.

In summary, PhantomALERT has stated claims against Google where it has alleged that Google itself engaged in the misconduct, and where it has alleged that Google acquired Waze's liabilities.

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PhantomALERT also notes that Google is the current registrant of the WAZE trademark, Google is the current registrant of the <waze.com> domain name, and Waze Ltd. assigned its patent for its mapping system to Google. See

- <http://whois.icann.org/en/lookup?name=waze.com;>
- <http://assignments.uspto.gov/assignments/q?db=tm&qt=sno&reel=&frame=&sno=79116560;>
- <https://www.google.com.ar/patents/US8958979;>
- [http://www.sec.gov/Archives/edgar/data/1288776/000128877615000008/goog20141231exhibit2101.htm.](http://www.sec.gov/Archives/edgar/data/1288776/000128877615000008/goog20141231exhibit2101.htm)

Thus, significant evidentiary questions exist about the structure of Google's acquisition of Waze.

CONCLUSION

For all of the reasons set forth above, the Court should deny Defendants' motion to dismiss in its entirety.

Respectfully Submitted,

Dated: November 9, 2015

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